**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 19**

OSBORNE CONSTRUCTION COMPANY

Employer

and Case 19-RC-13840

PACIFIC NORTHWEST DISTRICT
COUNCIL OF CARPENTERS

Petitioner

and Case 19-RC-13841

WASHINGTON AND NORTHERN IDAHO
DISTRICT COUNCIL OF LABORERS,
LOCAL 292, AFL-CIO

Petitioner

## SECOND SUPPLEMENTAL DECISION

Pursuant to a Decision and Direction of Election issued on September 1, 1999, an election by secret ballot was conducted on September 29, 1999, among the employees of the Employer in the following appropriate collective bargaining units:

### 19-RC-13840

All carpenters employed by the Employer at its Cascade High School jobsite in Everett, Washington; excluding all office clerical employees, guards and supervisors as defined by the Act, and all other employees.

### 19-RC-13841

All laborers employed by the Employer at its Cascade High School jobsite in Everett, Washington; excluding all office clerical employees, guards and supervisors as defined by the Act, and all other employees.

Upon the conclusion of the election, a tally of ballots was served upon the parties, setting forth the following election results:

**19-RC-13840**

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| Approximate number of eligible voters | 17 |
| Void ballots | 0 |
| Votes cast for Petitioner | 10 |
| Votes cast against participating labor organization | 3 |
| Valid votes counted | 13 |
| Challenged ballots | 11 |
| Valid votes counted plus challenged ballots | 24 |

**19-RC-13841**

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|---|---|
| Approximate number of eligible voters | 7 |
| Void ballots | 0 |
| Votes cast for Petitioner | 2 |
| Votes cast against participating labor organization | 2 |
| Valid votes counted | 4 |
| Challenged ballots | 6 |
| Valid votes counted plus challenged ballots | 10 |

The challenged ballots in each case were sufficient to affect the results of the elections.[1] On October 6, 1999, the Employer filed a timely common Objection to both elections, alleging, verbatim, the following conduct as warranting overturning the elections:

> During the pre-election conference which began about 11:00 a.m. on Wednesday, September 29, 1999, the Employer's representative requested the Board agent to establish a procedure for identifying voters because of the unique characteristics of these elections. He suggested that the voters present their drivers' licenses or some other suitable identification to safeguard the integrity of the elections. The Board agent responded that it was not the Board's policy to check identification and that employees had not been told to bring their drivers' licenses. As an alternative, the Board agent was asked to have each voter state his/her social security number or some other personal information. The Board agent responded that she was unwilling to invoke any method for identifying voters other than relying upon their representations as to whom they might be.

On November 3, 1999, the Regional Director issued a Notice of Hearing. That document advised the parties that the Hearing Officer was directed to prepare and serve on the parties a Report on Objections containing resolutions of credibility and recommendations to the Regional Director as to the disposition of the objection. Pursuant thereto, a hearing was conducted before Hearing Officer Linda L. Davidson on November 17 and 18, 1999. The parties were represented and afforded full opportunity to

[1] With respect to the Carpenters' unit, five of the 11 challenges were administratively resolved in the Regional Director's Order Partially Consolidating Cases, Supplemental Decision on Challenged Ballots and Objection, and Notice of Hearing issued November 3, 1999. The remaining six challenges are no longer determinative. With respect to the Laborers' unit, the challenged ballots are the subject of unresolved unfair labor practice proceedings.

be heard, to examine and cross-examine witnesses, to introduce evidence bearing upon the issues, and to make oral argument at the conclusion of the hearing.

On January 14, 2000, the Hearing Officer issued her Report on Objections in which she made findings of fact, formed conclusions of law, and recommended that the objection be overruled and that the appropriate certification be issued in the Carpenter's unit.

On January 28, 2000, the Employer filed exceptions to the Hearing Officer's Report with respect to her recommending that the objection be overruled.

I have reviewed the Hearing Officer's rulings made at hearing and find that they are free from prejudicial error. I have also carefully considered the Hearing Officer's Report, the Employer's exceptions, and the entire record in the proceeding. I hereby adopt the Hearing Officer's findings and conclusions only to the extent consistent herewith.

In the pre-election conference, an Employer representative raised the issue of requiring voters to show their drivers' licenses as proof of identity, inasmuch as the Employer's observer was not personally acquainted with all of the voters. The Board agent told the Employer's observer, John Osborne, that "We don't do that," or, "We won't do that." Employer representative Daniel Jacobson also suggested that Social Security numbers or parts of Social Security numbers be used to identify voters, a suggestion rejected by the Board agent.[2] Osborne testified that he interpreted the Board agent's remarks to mean that he would not be allowed to question the identity of any voter appearing at the polls. During the polling, Osborne did not question the identity of any voter, nor did either of the observers for the Unions. There is no evidence that any individual misrepresented his or her identity at the polls, nor any evidence that the observers experienced any confusion with respect to associating the correct name on the eligibility list with any individual voter who presented his or her self in the polling place. The record does not establish whether Osborne would have challenged any voters as to their identity but for his perception that the Board agent would not allow such challenges. It is undisputed that the Board agent did not tell Osborne and the other observers that they *could not* challenge a voter on the basis of identity. However, the testimony is in conflict as to whether the Board agent affirmatively told the observers, including Osborne, that they *could* challenge a voter on the basis of identity. The hearing officer did not resolve the conflict, and I will make my findings herein on the basis of the Employer's version.

The Employer excepts to the Hearing officer's conclusions that the elections herein were not of a sufficiently complex nature such that the Board agent was obliged by the Casehandling Manual to provide for voter identification.[3] In addition, the hearing officer concluded that the Board agent's denial, in the pre-election conference, of the Employer's request for some form of voter identification, was not improper. In so concluding, the hearing officer commented on the Employer's failure to raise the issue at any time prior to the pre-election conference. Further, the hearing officer concluded that the Board agent did not act improperly by failing to instruct observers that they could challenge the ballot of any voter whose identity was unknown to them.

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[2] The copies of the eligibility list entered into the record do not include the Social Security numbers of the employees. There is no evidence or contention that the official eligibility lists used in the elections did include Social Security numbers or parts thereof.

[3] Casehandling Manual, Part Two, Representation Proceedings, Section 11312.4 states, "In sufficiently large or complex elections, the Board agent should explore with the parties in advance of the election the identifying information to be utilized by the voters as they approach the observers at the checking table. If agreement is not reached between/among the parties, the Regional Director should consider whether to require identifying information in addition to self-identification by voters."

The Employer contends that the elections were complex, thus meeting the standard set forth in Casehandling Manual Section 11312.4, as quoted above, on the basis of the eligibility formula used, the inability of the Employer's observer to identify a majority of the individuals on the Excelsior list, the potential that many ineligible persons would attempt to vote, and the contentious relationship between the parties. Following the Employer's logic, if the election was "complex," then the Board agent's rejection of the request for objective identification of voters was improper, and, further, that in any event the Board agent failed to properly instruct the voters. I shall address these contentions one by one.

***The eligibility formula.*** Eligibility to vote was determined by the formula found in *Steiny and Company, Inc.,* 308 NLRB 1323 (1992), as in all construction industry cases. The units were limited to employees of the Employer employed at a single jobsite. The first employee on the jobsite was hired on about May 26, 1999. Thus, even though the *Steiny* formula would generally provide for the eligibility of employees who had worked for the Employer at some time further in the past, in this case only employees who had been employed during the approximately four months prior to the election, and who otherwise met the eligibility standards, would be eligible to vote. The Employer contends that, "proof of identity [should] be required in all construction industry representation elections involving the *Steiny* formula. It cannot reasonably be anticipated that an observer will recognize voters who may not have been employed by the employer for a year or more." Be that as it may, at present the Board does not require proof of identity in all construction industry elections. The Employer also contends that the use of the *Steiny* formula created a "risk" that ineligible individuals would vote. In fact, the potential exists in any election for ineligible individuals to present themselves at the polls, and I take administrative notice that they do so with regularity in elections in all industries. Such occurrences are routine matters which are handled through the official eligibility list and the challenge procedure. The Employer here is confusing the issue of eligibility with the issue of identity.

***The observer's inability to identify the voters.*** It is undisputed that the Employer's observer was not acquainted with a majority of the voters and indeed it was this circumstance which gave rise to the Employer's request for voter identification. However, this fact alone does not establish that the elections were of the "large or complex" nature contemplated by Section 11312.4 of the Manual. The Board's normal election procedures, whereby an observer may challenge any voter on the basis of doubts regarding the voter's identity, are sufficient to accommodate observers unacquainted with voters. The Employer relies on *Avondale Industries, Inc*., 180 F.3d 633 (5th Cir., 1999) in its brief in support of its exceptions. In *Avondale*, the Court said in full:

> The importance of reliable voter identification is reflected in NLRB's elaborate precautionary rules governing mail-in ballots. See NLRB Casehandling Manual, § 11336. Obviously, more flexibility is called for in developing identification procedures for in-person balloting. Representation elections cover bargaining units that may range from a few dozen employees at one worksite to thousands of employees dispersed among multiple shifts at numerous worksites. Verbal self- identification is appropriate when--as is probably true in a large portion of cases--it is likely that the observers are personally acquainted with the voters. It is wholly inadequate, however, as the sole guide to identification, where a very large bargaining unit is contemplated, and the voter lists contain virtually the only information that will assure the identity of the voters. The procedures used in *Newport News*[4] and *Monfort, Inc*.[5] confirm this common

[4] 239 NLRB 82 (1978).

[5] 318 NLRB 209 (1995).

> sense notion and equally condemn the unthinking adoption of "standard practice" for a multi-thousand employer like Avondale.
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> The voter identification procedure in this case was utterly insufficient. It is undisputed that most of the observers did not know the hundreds of employees who appeared during their stints at each of the voting zones. [Footnotes added.]

Thus, the Court in *Avondale* does not rule or even suggest that in every election of any size, the inability of even one observer to identify all of the voters requires more than verbal self-identification by voters.

The Employer also cites *Cities Service Oil Co*., 87 NLRB 324 (1949), and *Cummer-Graham Co*., 73 NLRB 603 (1947), in support of its contention that its observer's lack of ability to identify all the voters was sufficient cause to require that all voters show identification. It appears that the respective employer in each case did not provide an eligibility list to the Board,[6] and in each case the Board agents required voters to complete affidavits or other written statements before permitting them to vote, presumably in accordance with the philosophy expressed in the *Casehandling Manual's* longstanding provision in Section 11328, which provides for voting by affidavit in the absence of an eligibility list.

In addition, in *Cities Service*, which involved employees on nine ships, the Board agents challenged all ballots from the first two ships, because no company observers were present, but on the next four vessels voters were not challenged for this reason, even though no company observers were present at those pollings either. The Board declined to find that the Board agents had acted improperly in this regard. Further, in that case, the Board said, "Although the Employer is customarily accorded the privilege of having its observers at the polls, their presence is not required, nor is the Employer entitled to such representation as a matter of right." In *Cummer-Graham*, many of the voters could neither read nor write. The eligibility of each voter was checked in two ways: by taking from each person an affidavit attesting to facts proving eligibility; and by personal identification of each voter by the Employer's payroll clerk, who testified that he knew each and every employee. The Board noted that the payroll clerk's personal identification of each voter "was obviously a foolproof method of determining eligibility." These cases are both readily distinguishable from the instant case, in which, among other considerations, the Employer provided an eligibility list. The mere fact that the Board agents in *Cities Service* chose to challenge all of the ballots on the first two ships, in the absence of any company observers, or that in *Cummer-Graham* the company observer's acquaintance with all of the voters was considered to be an adequate basis for establishing eligibility, does not in any way establish any basis for making any finding herein.

***Potential that many ineligible persons would attempt to vote.*** The Employer also contends that because, prior to the election, the Unions encouraged large numbers of individuals to apply for positions at the jobsite,

> the Employer reasonably believed that when the election was held, the Unions would employ the same tactic by having large numbers of rejected applicants attempt to vote. In addition, eight subcontractors with dozens of employees were on the job site at the time of the election, and the job site was easily accessible to the public. Thus, Mr. Jacobson was legitimately concerned about the potential for voter fraud.

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[6] In both decisions, the Board notes the employer's failure to provide a "pay roll" or "pay-roll list." I note that both decisions issued prior to *Excelsior Underwear, Inc.* 156 NLRB 1236 (1966), and *NLRB v. Wyman-Gordon Co.,* 394 U.S. 759 (1969), which set forth the requirement for an employer to provide a list of employees considered eligible to vote.

Again, the Employer is confusing eligibility with identity. Further, I note that among the 11 challenged ballots in the larger, Carpenters' election, nine were persons whose names were not on the eligibility list, and among the six challenged ballots in the Laborers' election, apparently four were persons whose names were not on the list. The total of 13 is not an unmanageably large number of such voters. There is no evidence that any other potential voters whose names were not on the list presented themselves in the polling place and chose not to cast a challenged ballot.

***Contentious relationship between the parties.*** The Employer contends that the contentiousness of the relationship between the Employer and the Unions provoked suspicion (on the part of the Employer) in the same manner as occurred in *Avondale,* supra, wherein the Court said, "the election contest was bitter and hostile, sure to provoke suspicion in whichever party lost." However, the instant matter is distinguishable from *Avondale*, in that in that case the parties went ahead to election even though they were unable to agree on the size and composition of the bargaining unit, and the Board was aware that hundreds of employees would have to cast challenged ballots. The *Avondale* case involved almost 4,000 voters, including about 850 challenges. In finding that the Board erred in not requiring objective voter identification, the Court considered far more than merely the contentiousness of the parties. Moreover, in *Avondale*, there was objective evidence of numerous anomalies which in the Court's view raised serious questions concerning the possible occurrence of vote fraud. No such objective evidence was offered in the instant matter.

***Analysis.*** The primary purpose of voter identification, be it oral self-identification or otherwise, in any election is to enable the observers to accurately check off the names on the eligibility list. The potential for error in the process of checking off the names is comparatively minimal in elections such as those herein, where there were only 22 names on one list, and nine on the other. There is no evidence that the observers experienced any difficulty in ascertaining the correct names on the list, or that they inadvertently made any significant errors in checking off the names. Thus I can only conclude that the observers were able to ascertain the correct name on the eligibility list on the basis of the voters' oral representations as to their identities. Further, there is no evidence that any individual who presented himself at the polls misrepresented his or her identity.

Contrary to the Employer's contentions, I do not find that this election was in any way "complex." The number of voters in each election was comparatively small. It has not been shown that the appearance in the polling of any number of individuals whose names were not on the eligibility list could reasonably have been expected to or in fact did in any way create any difficulties with respect to the observers' ability to accurately check names against the list. The fact that the parties were contentious prior to the election does not elevate the level of complexity of the election itself. The use of the *Steiny* eligibility formula likewise did not increase the level of complexity of the election. In short, there is nothing whatever in the circumstances herein which obliged the Board agent to require objective identification of the voters in accordance with Section 11312.4 of the Casehandling Manual.

Furthermore, the mere fact that the Employer's observer was not personally acquainted with all of the voters did not oblige the Board agent to require objective identification. Inasmuch as the Board has long held that the presence of observers is not required in an election, and the Board does not require that a Board agent conducting an election in the absence of observers either challenge all voters or require objective identification, it follows that the Board agent is not obliged to take such measures in elections in which all parties do have observers, even if one or more observers is unacquainted with all of the voters. Therefore, the Board agent's refusal herein to require objective identification was not in itself improper.

With respect to the Board agent's purported failure to affirmatively inform the Employer's observer that he could challenge any voters whose identity he did not know, the Employer specifically relies on *Harry Lunstead Designs, Inc.,* 270 NLRB 1163 (1984), in which the Board said,

> It should be noted that we do not, hereby, require that a Board agent charged with supervising an election adhere to a scripted set of instructions, and that any deviation therefrom will be cause for requiring a new election. What we wish to emphasize, however, is that at an election the parties do look to the Board agent for guidance concerning the various procedures which the Board has devised to ensure a fair election. In giving such guidance, and depending on the particular situation at hand, the Board agent must use his or her best judgment to make certain that the parties are cognizant of what the Board requires.

In *Lunstead*, there was a disagreement in the pre-election conference as to the eligibility of a specific voter, and while the Board agent confirmed that the voter's eligibility could be resolved at a later date, he failed to point out the need to therefore challenge the voter's ballot. The Board found that such omission on the part of the Board agent caused the employer to reasonably believe that the person's vote could be contested later even if she cast an unchallenged ballot. In that election, there were 31 votes cast for the petitioner, 29 against, and one challenged ballot.

In *Kirsch Drapery Hardware*, 299 NLRB 363 (1990), the Board said:

> The guidelines included in the Manual are not binding procedural rules, but are intended to provide operational guidance in the handling of representation cases. NLRB Casehandling Manual (Part Two) Representation Proceedings, Introduction and Purpose. See also *Patrick & Co.,* 277 NLRB 477, 479 (1985) (unfair labor practice case). Although compliance with the guidelines contained in the Manual is desirable because those guidelines are intended to safeguard a free and fair election, the Board acknowledges the need to "avoid unrealistic standards which insist on improbable purity of word and deed on the part of the parties or Board agents." *Newport News Shipbuilding,* 239 NLRB 82, 91 (1978), remanded for hearing 594 F.2d 8 (4th Cir. 1979). (fn 10)
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> …
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> (fn 10) Neither *Harry Lunstead Designs*, 270 NLRB 1163 (1984), nor *Paprikas Fono*, 273 NLRB 1326 (1984), cited by the hearing officer, holds to the contrary. The Board did refer to the Manual guidelines in setting aside elections in those cases, but *it did not rely on the mere fact that the guidelines were not adhered to.* In *Harry Lunstead Designs*, various errors of the Board agent effectively denied a party's representative the opportunity to challenge a voter who was in fact ineligible to vote. [Emphasis added.]

Here, there is no objective evidence that the Employer was disadvantaged by the Board agent's purported failure to advise the Employer's observer that he could challenge any voters whose identity he doubted. There is no evidence here of any anomalies in the voting process such as occurred in the *Avondale* case,[7] nor any evidence that any individual misrepresented his or her identity to the observers. Contrary to the Employer's assertions, I do not find that the Board agent's purported omission here is analogous to the omission in *Lunstead*. As the Court said in *Avondale*, the question is not whether

[7] For example, in *Avondale*, "many employees were marked in a strange fashion, potentially indicating that the employees cast more than one ballot;" potentially 126 employees absent on the day of the election cast ballots in the election; and there was evidence of at least 13 "phantom" ballots, that is, only 3252 employees were marked as having voted, but 3265 votes were cast by "listed voters" in the election.

optimum practices were followed, but "whether *on all the facts* the manner in which the election was held raises a reasonable doubt as to its validity." [Emphasis added.]

On all the facts herein, I conclude that even if the Board agent did not affirmatively inform the Employer's observer that he could challenge voters on the basis of their identity, sufficient grounds for overturning the election herein have not been shown, inasmuch as there is no evidence of any misidentification of any voters, or that any individuals who were not eligible to vote were permitted to vote unchallenged.

## CONCLUSION

Having reviewed the Hearing Officer's Report and the entire record in this matter, I hereby affirm the Hearing Officer's rulings. I have modified her findings and conclusions as set forth above, and I have concluded in agreement with the Hearing Officer that the objection lacks merit. Therefore, I hereby adopt the Hearing Officer's recommendation, and I overrule the objection in its entirety. Accordingly, I hereby issue the following:

## CERTIFICATION OF REPRESENTATIVE

Pursuant to authority vested in the undersigned by the National Labor Relations Board,

**IT IS HEREBY CERTIFIED** that a majority of the valid ballots has been cast for the Pacific Northwest District Council of Carpenters, and that it is the exclusive bargaining representative of all employees in the following appropriate unit:

> All carpenters employed by the Employer at its Cascade High School jobsite in Everett, Washington; excluding all office clerical employees, guards and supervisors as defined by the Act, and all other employees.

## RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by February 22, 2000.

**DATED** at Seattle, Washington, this 7th day of February, 2000.

/s/ RAYMOND D. WILLMS

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